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Supreme Court, U.S.

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No. 96-542

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In The
Supreme Court of the United States
October Term, 1996

WALTER MCMILLIAN,

Petitioner,

v.

MONROE COUNTY, ALABAMA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the sheriff of a county is a final policymaker for the county in matters of law enforcement for purposes of county liability under 42 U.S.C. § 1983.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Eleventh Circuit is reported as *McMillian v. Johnson*, 88 F.3d 1573 (11th Cir. 1996), and is reproduced in the appendix to the petition for writ of certiorari at 1a. The opinion of the United States District Court for the Middle District of Alabama is unreported and is reproduced in the appendix at 25a. A relevant December 13, 1993 order of the district court is unreported and is reproduced in the appendix at 77a.

 JURISDICTION

The judgment of the Court of Appeals was entered on July 9, 1996. The petition for writ of certiorari was filed on October 7, 1996, and was granted on December 6, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1).

 STATUTES INVOLVED

The federal statute involved is 42 U.S.C. § 1983. Article V, § 138 of the Alabama Constitution is relevant, as are various provisions of the Alabama Code, including §§ 36-22-2, 36-22-3, 36-22-5, 36-22-6, 36-22-13, 36-22-16, 36-22-17, 36-22-18, 36-22-19, 36-22-42, 11-1-11, and 11-2-30 (1975). All of these provisions are set out at 81a.

STATEMENT OF THE CASE

On March 3, 1993, petitioner Walter McMillian was freed from prison after serving nearly six years on Alabama's death row for a crime he did not commit. Over a year of Mr. McMillian's incarceration on death row took place before he had been tried or convicted of any offense. Pet. App. 26a. Mr. McMillian's release occurred after evidence was uncovered that law enforcement officials had concealed exculpatory records and statements supporting his innocence. The Alabama Court of Criminal Appeals held that Mr. McMillian's due process rights had been violated, and reversed his conviction. *McMillian v. State*, 616 So. 2d 933 (Ala. Crim. App. 1993). All charges against him were then dismissed. Pet. App. 2a.

Soon after his release, Mr. McMillian filed a civil action under 42 U.S.C. § 1983, seeking damages for violations of his federal constitutional rights as well as various state law torts stemming from wrongful conduct in connection with his arrest, incarceration and the criminal investigation. Pet. App. 2a. Mr. McMillian sued Monroe County Sheriff Tom Tate, and Monroe County, in addition to other government officials. Pet. App. 2a. Mr. McMillian contends that the county is liable for Sheriff Tate's unconstitutional acts because the sheriff's edicts and acts may fairly be said to represent the official policy of Monroe County in the area of criminal investigations and law enforcement. Pet. App. 2a.

Among other things, Mr. McMillian has alleged that Sheriff Tate subjected him to racial slurs,¹ threats and

¹ Mr. McMillian is black and Sheriff Tate is white.

insults upon his arrest and while detained in the Monroe County Jail, Pet. App. 32a; that the sheriff conspired with others to punish, intimidate and threaten him by placing him on death row for over a year before his trial, Pet. App. 26a; that the sheriff withheld from prosecutors and his defense counsel exculpatory evidence demonstrating his innocence, Pet. App. 27a-28a; and that the sheriff manufactured inculpatory evidence by pressuring and coercing witnesses to give false testimony which resulted in his wrongful conviction. Pet. App. 28a-29a.

Mr. McMillian contends that all of the unconstitutional actions of Sheriff Tate were financed, funded and equipped by Monroe County, Pet. App. 12a, whose citizens elect the sheriff and empower him with final policymaking authority in the area of law enforcement. Pet. App. 11a-12a. Mr. McMillian additionally contends that the sheriff's unconstitutional actions are part of the county's unwritten policy and custom. The record in this case reflects that any judgment against Sheriff Tate is likely to be paid by Monroe County through its insurance policy with the Association of County Commissions of Alabama. Pet. App. 77a.

Motions to dismiss were filed by each of the individual defendants and were denied, in whole or in part, by the district court. Pet. App. 25a. However, the court granted Monroe County's motion to dismiss, relying entirely upon the Eleventh Circuit's subsequently vacated decision in *Swint v. City of Wadley*, 5 F.3d 1435, 1450-1451 (11th Cir. 1993), *vacated sub nom., Swint v. Chambers*

County Comm'n, 115 S. Ct. 1203 (1995). Pet. App. 53a-58a.² The district court then issued an order under 28 U.S.C. § 1292(b) certifying the county liability issue for interlocutory appeal. The Eleventh Circuit agreed to the certification. Pet. App. 3a.

On appeal the Eleventh Circuit did not dispute that a sheriff in Alabama is elected by the county, is financed and equipped by the county, and works only within the county. Pet. App. 11a-12a. Moreover, the court did not dispute that the sheriff has final policymaking authority for law enforcement functions. Pet. App. 9a. However, the Eleventh Circuit ruled that the "county," by which it presumably meant the county commission or the other parts of the county's government, could be distinguished from the sheriff. Pet. App. 10a. Although it recognized the absence of any clear authority for its position, Pet. App. 11a, the court held that because Alabama state law gives no one else in county government law enforcement authority other than the sheriff, the county cannot be liable for the sheriff's unconstitutional policy. Pet. App. 8a, 18a.

² After the district court adjudicated the motions to dismiss, the court entertained motions for summary judgment by the defendants, granting them in part and denying them in part. Because some of the denials of summary judgment involved issues of qualified immunity, Sheriff Tate and some of the other defendants appealed pursuant to *Mitchell v. Forsyth*, 472 U.S. 511 (1985). In that separate appeal, the Eleventh Circuit affirmed the district court for the most part, leaving Sheriff Tate and several other defendants in the case. *McMillian v. Johnson*, 88 F.3d 1554 (11th Cir. 1996).

Relying on the reasoning of *Swint v. City of Wadley*, 5 F.3d 1435 (11th Cir. 1993), subsequently vacated by this Court on jurisdictional grounds, *Swint v. Chambers County Comm'n*, 115 S. Ct. 1203 (1995), the Eleventh Circuit concluded that "Alabama law assigns law enforcement authority to sheriffs but not to counties." Pet. App. 8a. The court stated:

The Supreme Court has not addressed whether a municipality must have power in an area to be held liable for an official's acts in that area. Still, we think that such a requirement inheres in the Court's municipal liability analysis. As Justice O'Connor explained in [*City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988)], a municipal policymaker is the official with final responsibility "in any given area of a local government's business." 485 U.S. at 125.

Pet. App. 8a. The court further stated:

Our holding here that Sheriff Tate is not a final policymaker for Monroe County in the area of law enforcement, because Monroe County has no law enforcement authority, really is just another way of saying that when Sheriff Tate engages in law enforcement he is not about the business of county government.

Pet. App. 18a.

In addition, the court of appeals suggested that, while not dispositive, the nominal reference to the sheriff as a member of the state executive department under one provision of Alabama law, and related immunities of the sheriff under state tort law, weigh against county liability for purposes of § 1983. Pet. App. 13a.

On December 6, 1996, this Court granted Mr. McMillian's timely petition for writ of certiorari.

SUMMARY OF THE ARGUMENT

In *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), this Court held that counties and municipalities are liable for the unconstitutional actions of local officials with final policymaking authority. *Id.* at 690. In *Pembaur v. Cincinnati*, 475 U.S. 469, 485 (1986), and in almost every circuit, it has been held that when a sheriff is elected, funded and equipped by the county, with jurisdiction limited to the county, the sheriff is the county's final policymaker in the area of law enforcement. In this case, the Eleventh Circuit properly held that an Alabama sheriff has final policymaking authority in the area of law enforcement. Pet. App. 9a. However, the court improperly held that because state law gives law enforcement authority to "sheriffs but not counties," Pet. App. 8a, the county is not liable for the sheriff's unconstitutional conduct. Pet. App. 18a.

The court below erred by expanding the requirements for county liability under § 1983. That is, the court required that a county official with final policymaking authority in an area share that authority with some additional county official before there can be county liability. This violated the Court's precedent in *Pembaur* and the dictates of *Monell* and its progeny. Because the county sheriff in Alabama is the local official with final policymaking authority in the area of law enforcement and because the sheriff's power is derived from his election

by the county's residents, his funding and financing from the county treasury, and his limited jurisdiction over the county only, the county is liable for the sheriff's unconstitutional policy and conduct under § 1983.

Even if the Eleventh Circuit's shared authority requirement for county liability were proper, other county officials in Alabama are, in fact, involved in the sheriff's administration of law enforcement. County commissions exercise discretionary authority over the funding of law enforcement operations and equipment purchases for law enforcement activities. County commissions also exercise authority over the staffing, rank and pay of law enforcement personnel. Moreover, Alabama law requires the county coroner and other county officials to occasionally carry out law enforcement duties. Consequently, the court below erred in concluding that when the sheriff engages in law enforcement "he is not about the business of county government." Pet. App. 18a.

Finally, the fact that county sheriffs have been nominally regarded as part of the state executive branch in no way diminishes their status as county officials with final policymaking authority in the area of law enforcement. Rather, Alabama law typically describes the sheriff as a county rather than a state official. Moreover, no matter how the sheriff is labeled in some instances, his or her functional status as the county's chief executive officer in the area of law enforcement establishes the county's liability for the sheriff's unconstitutional conduct.

ARGUMENT

I. WHEN A COUNTY ELECTS, EMPLOYS, FUNDS AND EQUIPS A COUNTY SHERIFF WHO HAS FINAL POLICYMAKING AUTHORITY IN THE AREA OF LAW ENFORCEMENT WITHIN BUT NOT OUTSIDE THE COUNTY, THE SHERIFF'S UNCONSTITUTIONAL OFFICIAL ACTIONS SUBJECT THE COUNTY TO LIABILITY UNDER 42 U.S.C. § 1983.

A. This Court Has Previously Approved the Relevant Factors for Determining Whether a Sheriff is the County's Final Policymaker.

In *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), this Court held that "the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies." *Id.* at 690. Although *Monell* clearly established that local governments may be sued under 42 U.S.C. § 1983 for a deprivation of rights protected by the Constitution, the Court rejected liability against municipalities based on a theory of *respondeat superior*. "[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Monell*, 436 U.S. at 694 (emphasis added).

In *Pembaur v. Cincinnati*, 475 U.S. 469, 483 (1986), and in *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988), the Court held that local officials who have "final policymaking authority" may by their actions subject the county or municipality to § 1983 liability. Relying on *Pembaur*, Justice O'Connor's plurality opinion in *Praprotnik* explained that whether an official has final policymaking authority depends on state law, *Praprotnik*, 485 U.S. at 123, and custom and usage. *Id.* at 127. Finally, in *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989), a majority of the Court affirmed the principles in *Pembaur* and *Praprotnik*, and held that a trial judge must "identify those officials or governmental bodies who speak with final policymaking authority" in evaluating whether a municipality or county is liable. *Jett*, 491 U.S. at 737.

In *Pembaur*, a majority of this Court held that a county sheriff in Ohio acted as a final policymaker for the county in the area of law enforcement. *Pembaur*, 475 U.S. at 476, 484-85. The Court affirmed the Sixth Circuit's conclusion that Ohio sheriffs are elected by the residents of each county, serve as the chief law enforcement officers in their counties, receive their offices, books, furniture, and other materials from their counties, and receive their salary and training expenses from their counties. *Pembaur v. Cincinnati*, 746 F.2d 337, 341 & n.3 (6th Cir. 1984). Consequently, the Court held that the county was liable for the unconstitutional conduct of the sheriff in the performance of law enforcement functions. *Pembaur*, 475 U.S. at 485.

Under Alabama law, as in Ohio, sheriffs are elected by the residents of their respective counties, are paid by

their counties, and receive their offices, books, furniture and other materials from their counties. Ala. Const. art. V, § 138 (1901); Ala. Code §§ 36-22-16, 36-22-18 (1975). Sheriffs in Alabama serve as the chief law enforcement officers in their counties inasmuch as their decisions are final and unreviewable and state law confers on them the duty to enforce the law "in their respective counties." Ala. Code § 36-22-3(4) (1975). Alabama sheriffs also receive their training expenses and other fees from their counties. See 187 Op. Att'y Gen. Ala. 23 (1982). Thus, there is nothing of relevance to distinguish the Alabama sheriff in this case from the Ohio sheriff in *Pembaur*. However, unlike the Court in *Pembaur*, the Eleventh Circuit failed to recognize that the Alabama sheriff is the final policymaker for his or her county in the area of law enforcement.

The Eleventh Circuit acknowledged that Alabama sheriffs are elected by the voters of their county, that the sheriffs' law enforcement operations are funded by their county commission from the county treasury, and that sheriffs exercise final law enforcement authority within their counties but not outside of them. Pet. App. 15a-16a & n.5. Despite these dispositive aspects of state law, the Eleventh Circuit nevertheless held that, for purposes of § 1983, an Alabama sheriff is not a final policymaker for the county. According to the Eleventh Circuit: "Alabama law assigns law enforcement authority to sheriffs but not to counties." Pet. App. 8a. The court erred by presupposing, without any analysis, that the sheriff is distinct from county government and that the sheriff's power is not exercised on behalf of the county unless shared with other county officials.

B. The Court Below Improperly Expanded the Requirements for Establishing County Liability For a County Sheriff's Final Policymaking.

This Court has held that questions of policymaking authority are determined by looking to state law. *Praprotnik*, 485 U.S. at 123, 127. However, while the actual operation of local government is a question of state law, the question remains whether those state law principles add up to "final policymaker" status as a matter of federal law. In this case the Eleventh Circuit rejected commonly examined state law factors and, instead, imposed new federal requirements for holding a county liable under § 1983. The Eleventh Circuit improperly ruled that the "county," by which it presumably meant the county commission or the other parts of the county's government, could be distinguished from the county sheriff. Although it recognized the absence of any clear authority for its position, Pet. App. 11a, the court reasoned that because Alabama state law gives no one else in county government law enforcement authority other than the sheriff, the county cannot be liable for the sheriff's unconstitutional policy. Pet. App. 13a n.4.

Such reasoning abandons the functional analysis of county liability approved by this Court in *Pembaur*. In so holding, the court below misconstrued the holdings of this Court and the requirements for county liability under § 1983. Neither this Court nor the Sixth Circuit in *Pembaur* based its ruling on any express delegation of substantive law enforcement authority to Ohio counties independent of that to the sheriffs. It is not as if county governing boards in Ohio have independent law enforcement authority, or directly supervise the law enforcement

activities of their sheriffs, or ride around with the sheriffs in the patrol cars. In addition, unlike the Eleventh Circuit, other circuit courts have adopted the relevant state law factors this Court relied on in *Pembaur* in concluding that sheriffs are final policymakers for their respective counties.³ Indeed, the court below conceded that its reasoning conflicted with other federal courts. Pet. App. 16a n.6.

The Alabama sheriff and his or her local law enforcement authority is not unique. In many states, the sheriff has sole authority over local law enforcement and is "the county's final policymaker in the area of law enforcement, not by virtue of delegation by the county's governing body but, rather, by virtue of the office to which the sheriff has been elected." *Turner v. Upton County, Texas*,

³ Circuit courts have almost uniformly held that where a sheriff is funded by the county, is elected by the county and has jurisdiction only in the county, the sheriff is the final policymaker for the county. See *Davis v. Mason County*, 927 F.2d 1473, 1480-1481 (9th Cir.) (Washington county liable for sheriff who has final law enforcement authority), *cert. denied*, 502 U.S. 899 (1991); *Turner v. Upton County, Texas*, 915 F.2d 133, 136-37 (5th Cir. 1990) (Texas county liable for sheriff who completely controls county law enforcement and is accountable to county voters), *cert. denied*, 498 U.S. 1069 (1991); *Marchese v. Lucas*, 758 F.2d 181, 188-89 (6th Cir. 1985) (Michigan county liable for sheriff who is elected by county voters and is funded by county), *cert. denied sub nom. County of Wayne v. Marchese*, 480 U.S. 916 (1987); see also *Dotson v. Chester*, 937 F.2d 920, 925-32 (4th Cir. 1991) (Maryland county liable for sheriff even though under relevant state law sheriff is considered state officer for purposes of state tort liability). But see *Soderbeck v. Burnett County, Wisconsin*, 752 F.2d 285, 292-93 (7th Cir.) (no county liability where plaintiff "made no effort to show that the sheriff is a policy-making official of the county government"), *cert. denied*, 471 U.S. 1117 (1985).

915 F.2d 133, 136 (5th Cir. 1990), *cert. denied*, 498 U.S. 1069 (1991). As the Fifth Circuit has recognized, because a county official like a sheriff holds "virtually absolute sway over the particular tasks or areas entrusted to him by state statute and is accountable to no one other than the voters for his conduct therein," his actions may be said to represent official policy for which the county may be liable. *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980); see also *Crowder v. Sinyard*, 884 F.2d 804, 828 (5th Cir. 1989) (county in Arkansas liable for sheriff's conduct even though sheriff is "solely responsible for the procedures and practices of the department; there is no legislative or other higher body, beyond a court of law, to which the sheriff answers"), *cert. denied*, 496 U.S. 924 (1990).

The Eleventh Circuit's distinction between the county and the county's sheriff is meaningless for purposes of § 1983 liability. As the First Circuit has explained:

What the County misunderstands is that it is not because county officials *other than the Sheriff* were "involved" in the promulgation of the strip search rule, that it is liable under *Monell*, nor is it because county officials failed properly to "oversee" the Sheriff. Rather, it is liable because the Sheriff was the county official who was elected by the County's voters to act for them and to exercise the powers created by state law. Accordingly, the Sheriff's strip search policy *was* Plymouth County's policy, and the County must respond in damages for any injuries inflicted pursuant to that policy.

Blackburn v. Snow, 771 F.2d 556, 571 (1st Cir. 1985).

Monell recognized that unconstitutional conduct by "lawmakers" as well as "by those whose edicts or acts may fairly be said to represent official policy" may give rise to county liability. *Monell*, 436 U.S. at 694; see also *Jett*, 491 U.S. at 737 (a judge may find municipal liability for "those officials or governmental bodies who speak with final policymaking authority"). By requiring that some county official other than the sheriff share law enforcement power before the sheriff can be deemed a county policymaker, the Eleventh Circuit's opinion below conflicts with *Pembaur* and with the proper understanding of § 1983 final policymaking doctrine. Because § 1983 is a remedy "to be broadly construed against all forms of official violation of federally protected rights," *Monell*, 436 U.S. at 700-701, the lower court's judgment should be reversed.

II. EVEN IF THE ELEVENTH CIRCUIT'S SHARED AUTHORITY APPROACH WERE PROPER, THE COURT BELOW ERRED IN CONCLUDING THAT AN ALABAMA SHERIFF'S LAW ENFORCEMENT ACTIVITIES FALL OUTSIDE THE LOCAL GOVERNMENT'S BUSINESS AND THAT THE SHERIFF IS THUS NOT THE FINAL POLICYMAKER FOR THE COUNTY.

According to the Eleventh Circuit, county liability for the sheriff's conduct exists only if he or she is "going about the local government's business." Pet. App. 8a (citing *Praprotnik*, 485 U.S. at 125). As explained previously in this brief, the Eleventh Circuit erred in presupposing that the sheriff operates distinctly from the county

and that other county officials must share law enforcement authority before the sheriff can be considered a county policymaker.

But even under the Eleventh Circuit's erroneous reasoning, it is clear that in Alabama, as in most states, other county officials are, in fact, actually involved in the law enforcement operation. Particularly in its funding through the county treasury, as well as in other ways, there is a shared authority between the sheriff and other county officials. This relationship with the rest of the county government and the county treasury, as well as his or her relationship with the voters, shows that the sheriff is "going about the [county's] business."

As noted above, in Alabama the county voters elect the sheriff. Ala. Const. art. V, § 138 (1901). The sheriff must pay to the county treasury all fees, monies and other funds collected by him or her. Ala. Code § 36-22-17 (1975). The county treasury pays the sheriff's salary as it does every other county official. Ala. Code. § 36-22-16(a) (1975). The county commission finances all law enforcement programs. Ala. Code § 36-22-18 (1975) ("The county commission shall also furnish the sheriff with the necessary quarters, books, stationery, office equipment, supplies, postage and other conveniences and equipment, including automobiles and necessary repairs, maintenance and all expenses incidental thereto, as are reasonably needed for the proper and efficient conduct of the affairs of the sheriff's office."). In addition, when the sheriff cannot discharge his or her duties, the county coroner, another county official, must exercise the sheriff's law enforcement authority. Ala. Code § 11-5-5 (1975); see also Ala. Code § 15-4-9 (1975) (county coroner may

issue arrest warrants); Ala. Code § 15-4-4 (1975) (county coroner may serve subpoenas).

County officials, other than the sheriff, review contracts, take bids and make other discretionary judgments regarding law enforcement functions. *See Mobile Dodge, Inc. v. Mobile County*, 442 So. 2d 56 (Ala. 1983) (county commissioners and the county sheriff's department work together and the county is liable for business transactions undertaken to secure the sheriff's law enforcement needs). In addition, the county commission finances the county sheriff's law enforcement training, *see* 187 Op. Att'y Gen. Ala. 23 (1982) ("[T]he County may pay the expenses incidental to sending a police officer to a law enforcement academy, including salary."), and all other expenses relating to law enforcement activities. *See* Ala. Code § 36-22-19 (1975) (authorizing counties to pay county sheriffs' membership dues in Alabama Sheriffs Association).

The Eleventh Circuit has even recognized that the county government and the county sheriff act in a "partnership" with regard to the care and maintenance of jails and the treatment of pretrial detainees and, thus, in this context the county can be liable for the sheriff's conduct. *Parker v. Williams*, 862 F.2d 1471, 1478-79 (11th Cir. 1989). Contextualizing the work of the sheriff in this way, by distinguishing sheriffs' duties in and around the jail from the sheriffs' duties in law enforcement generally, is misguided. Law enforcement often requires the arrest and detention of criminal suspects until trial, yet under the Eleventh Circuit's rationale, the arrest, detention and safekeeping of those awaiting trial is not part of the

sheriff's law enforcement duties. This arbitrary distinction – between the specific law enforcement functions of jailing and managing pretrial detainees and the general "law enforcement area" – is highly unworkable, as is illustrated in this case. Many of the alleged violations of Mr. McMillian's rights relate to how he was housed and treated while a pretrial detainee. Moreover, there is a partnership between the county commission and the county sheriff in the law enforcement area because the commission is responsible for equipping the sheriff and funding all law enforcement activities and investigations. Under these circumstances the county sheriff's law enforcement work is necessarily a part of the local government's business.

Additionally, Alabama law does accord local government officials other than the sheriff some power in the administration of law enforcement. County commissions do not automatically acquiesce, without question, every time a sheriff makes a funding request for law enforcement operations. Rather, the commission exercises discretion over how to equip its sheriff department, and how much to fund law enforcement activities. The Alabama Supreme Court has held that local governments may establish budgetary appropriations regarding staffing, equipment, overtime pay to deputy sheriffs and other essential law enforcement functions. *See, e.g., Geneva County Comm'n v. Tice*, 578 So. 2d 1070, 1075 (Ala. 1991) (county may limit budget for law enforcement functions). Indeed, state law gives county commissions the authority to reject specific requests for law enforcement operations. *Ball v. Escambia County Comm'n*, 439 So. 2d 148 (Ala. 1983)

(commission may refuse to pay for some law enforcement operations even though sheriff makes specific request).

County commissions may also regulate and determine the classification and rank of deputy sheriffs. *See, e.g., Tuscaloosa County Comm'n v. Deputy Sheriffs' Ass'n*, 632 So. 2d 442, 444 (Ala. 1993) (upholding the county commission's demotion of several sheriff deputies). In addition, the sheriff's personnel decisions are subject to review by the County Personnel Board. *See Fields v. State ex rel. Jones*, 534 So. 2d 615, 616-17 (Ala. Civ. App. 1987) (denial of deputy medical leave); *Etowah County Personnel Bd. v. McDowell*, 437 So. 2d 563, 563-64 (Ala. Civ. App. 1983) (termination of deputy sheriff for insubordination).

Moreover, the Alabama Attorney General's office has authorized counties to provide legal representation and insurance coverage to county sheriffs for the performance of law enforcement duties. 194 Op. Att'y Gen. Ala. 14 (1984). In fact, local governments in Alabama routinely provide legal representation to sheriffs when the sheriffs are sued for the performance of their law enforcement duties and similarly provide insurance coverage for county law enforcement conduct. *See First Mercury Syndicate v. Franklin County*, 623 So. 2d 1075, 1075 (Ala. 1993) (Franklin County purchased professional liability insurance for "its" sheriff department officers); *see also* Ala. Code § 11-1-9 (1975) (authorizing counties to defend lawsuits against county officials). Most significantly, in this case, the record indicates that Sheriff Tate's defense, and any judgment against the sheriff would be paid not by the state, but by an insurance fund paid for by the county through the Association of County Commissions of Alabama. Pet. App. 77a.

The Eleventh Circuit erred in concluding that when "Sheriff Tate engages in law enforcement he is not about the business of county government." Pet. App. 18a. Requiring more of a relationship between the county sheriff and other county officials than exists in Alabama subverts § 1983 and conflicts with this Court's precedent.

III. TO THE EXTENT THAT THE ELEVENTH CIRCUIT RELIED ON THE COUNTY SHERIFF'S NOMINAL DESIGNATION AS A "STATE OFFICER", THE COURT ERRED.

The Eleventh Circuit distinguished Alabama sheriffs from the Ohio sheriffs in *Pembaur* by referencing the Alabama Constitution which provides that the state executive department "shall consist of a governor, lieutenant governor, attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, and a sheriff for each county." Ala. Const. art. V, § 112 (1901). Based on this provision and an Alabama Supreme Court decision which relied on this provision, *see Parker v. Amerson*, 519 So. 2d 442 (Ala. 1987), the Eleventh Circuit concluded that Alabama has designated the county sheriff to be a state official. The lower court appropriately recognized that this designation is not dispositive, but nonetheless held that it is "relevant to whether a sheriff exercises state or county power." *McMillian*, Pet. App. 13a. While it correctly refused to expressly conclude that Alabama sheriffs exercise state power and are therefore final policymakers for the state, the court erred by failing to recognize that sheriffs are county officials and therefore

exercise power in a manner that may subject counties to liability under § 1983.

As noted in prior sections of this brief, the sheriff in Alabama – like sheriffs in most states – is elected by the county's voters, is funded by the county treasury, exercises unreviewable authority within but not outside the county, and is involved with the county's business. In terms of the sheriff's functioning, he or she is clearly a county-based official who makes county law enforcement policy. Beyond that, the sheriff in Alabama, as in other states, is commonly understood to be a county official.

The word "sheriff" is generally considered to denote a county official. See *American Heritage Dictionary of the English Language* 1663 (3d ed. 1992) (defining "sheriff" as the "chief law enforcement officer . . . in a U.S. county"). Indeed, the word "sheriff" is derived from the Saxon word "scyre," meaning shire or county, and "reve," meaning keeper. Anderson, *A Treatise on the Law of Sheriffs, Coroners and Constables*, 5 (Dennis and Co, Inc., 1941). Treatises and books regarding law enforcement uniformly recognize the position of sheriff in the United States as a position with county authority:

The principal county police position is that of sheriff, perhaps the oldest law-enforcement office in Anglo-American history. . . . The sheriff has broad powers covering the entire spectrum of criminal justice, including detection and apprehension of offenders, administration of county jails [and] execution of court orders. . . .

Kurian, *World Encyclopedia of Police Forces and Penal Systems*, 430 (Facts on File, 1989).⁴

Notwithstanding the fact that sheriffs are identified in Alabama's constitution under the state's executive system, they clearly set policy for their counties.⁵ In addition, Alabama law does not specify that the sheriff sets law enforcement policy for the state as opposed to the county, or that the sheriff is not a final county policy-maker in the area of law enforcement. In fact, Alabama law expresses the common understanding that the sheriff is a county-based official setting policy for the county. For example, the Alabama Code § 36-3-4 (1975) explicitly identifies county officers in Alabama as "[t]he sheriff, one coroner, members of county commissions, one county treasurer, when elective, and one constable for each election precinct. . . ." Alabama courts have similarly recognized that the sheriffs' law enforcement operations are

⁴ "The sheriff's department is one of the major components of county government. The sheriff is the principal police official within a county. . . ." John A. Humphrey and Michael E. Milakovich, *The Administration of Justice: Law Enforcement, Courts, and Corrections*, 102 (Human Science Press, 1981). "Throughout U.S. history, the sheriff has remained the principal law enforcement officer in the county." George T. Felkenes, *The Criminal Justice System: Its Functions and Personnel*, 53 (Prentice-Hall, 1973). "The most universal of all the county officers is the sheriff; he is found in every one of the 3,050 counties in the United States. . . ." Paul Wager, *County Government Across the Nation*, 15 (University of North Carolina Press, 1950).

⁵ The language of Article V, § 112 of the Alabama Constitution is in itself ambiguous. By providing that the state executive branch shall include a sheriff "for each county," there is explicit recognition that the sheriff operates as a county officer.

part of the county's structure and that the sheriff is "chief executive officer of that department of county government." *Hale v. Randolph County Comm'n*, 423 So. 2d 893, 895 (Ala. Civ. App. 1982).

The designation of Alabama sheriffs as county officers is decades old. In *Jefferson County v. Dockerty*, 249 Ala. 196, 30 So. 2d 474 (Ala. 1947) (deputy sheriff entitled to receive reward money from county for making arrests), the Alabama Supreme Court recognized that "the sheriff of Jefferson County is undoubtedly a county officer. . . ." *Id.* at 477. In *In re County Officers*, 143 So. 345, 225 Ala. 359 (Ala. 1932), the court held that sheriffs are "strictly speaking, county officers" for purposes of a 1912 constitutional amendment regarding county officer's salaries. And in *State ex rel. Marin v. Pratt*, 68 So. 255, 257 (Ala. 1915), the court held that "a sheriff [is] the highest purely executive officer of a county." *Id.* at 257; see also *Barbour County Comm'n v. Employees of the Barbour County Sheriff's Dep't*, 566 So. 2d 493 (Ala. 1990) (members of Barbour County Sheriff's Department entitled to Barbour County employee retirement and insurance benefits).⁶

⁶ Alabama law additionally distinguishes sheriffs from local state officials in the judicial system:

All full-time county personnel, including all persons for whom funding is provided by the unified judicial budget, serving the district and circuit courts, other than sheriff's deputies and employees and building maintenance and security personnel, shall become employees of the State of Alabama on October 1, 1977.

Ala. Code § 12-17-1 (1975) (emphasis added).

Similarly, Alabama law requires that every state election ballot must comply with the sample set forth by the legislature in Alabama Code § 17-8-5 (1975) ("The ballot herein provided shall be substantially in the following form[.]"). The Code's sample ballot identifies who is a county official by listing public officials in five distinct categories: state, congressional, presidential, legislative, and county. Sheriffs are again designated as county officials.⁷

⁷ In addition to affirmatively recognizing sheriffs as county officers, Alabama law omits sheriffs from those designated as state law enforcement officers. Alabama Code § 36-21-2(a) (1975) contains a comprehensive listing of all state law enforcement officers in Alabama, but it does not include county sheriffs:

Any state law enforcement officer of the State of Alabama who is employed by the Department of Public Safety, Department of Industrial Relations, Department of Conservation and Natural Resources, Alabama Alcoholic Beverage Control Board, Department of Agriculture and Industries, Alabama Department of Forensic Sciences, the Transportation Enforcement Division of the Alabama Public Service Commission, Alabama Liquefied Petroleum Gas Board or probation and parole officers of the Alabama Board of Pardons and Paroles, fire marshals of the Department of Insurance, revenue enforcement officers of the Department of Revenue, law enforcement officers of the State Capital Police, any investigator employed by a district attorney on a full-time basis, or correctional officers of the Department of Corrections shall receive a subsistence allowance. . . .

Alabama Code § 36-21-2(a) (1975).

The Alabama Department of Public Safety is the state's primary law enforcement authority. Members of the State Highway Patrol, under the authority of the Director of Public Safety, Ala. Code § 32-2-3(2) (1975), have the powers of peace officers in Alabama "and may exercise such powers *anywhere within the state*." Ala. Code § 32-2-22 (1975) (emphasis added); *see also* Ala. Code § 9-2-86 (1975) (employees of the marine resources division of the Department of Conservation and Natural Resources have power to enforce laws with reference to seafood in any county of the State of Alabama); Ala. Code § 9-13-10 (1975) (employees of the state forestry commission may enforce laws anywhere in the state).⁸ In addition, state law enforcement officers are paid from the state treasury and insured by the state government, in contrast to Sheriff Tate who is paid from the county treasury and insured by the county government.⁹

Moreover, the handful of Alabama cases that designate sheriffs to be "state officials" for the purposes of respondeat superior or for state law immunity purposes do not control the question of the county's liability under

⁸ In contrast, a county sheriff may only make arrests within the borders of the sheriff's county: "An arrest may be made, under a warrant or without a warrant, by any sheriff or other officer acting as sheriff or his deputy . . . *within the limits of the county*." Ala. Code § 15-10-1 (1975) (emphasis added); *see also* Ala. Code § 36-22-3(4) (1975) ("It shall be the duty of the sheriffs in their respective counties . . . to secure evidence of crimes in their counties. . . .") (emphasis added).

⁹ In this case, any judgment against the sheriff is to come not from the state treasury but from an insurance fund set up by Alabama's counties. This further supports Sheriff Tate's status as a county official. Pet. App. 77a.

§ 1983.¹⁰ *See Howlett v. Rose*, 496 U.S. 356, 376-78 (1990) (holding that Florida law which granted immunity to municipal entities did not preclude § 1983 claim against county school board); *Martinez v. California*, 444 U.S. 277, 284 (1980) (asserting that California statute which immunized parole decision-makers did not control § 1983 claim against public employees).

To the extent the Eleventh Circuit found state tort law immunities and the nominal identification of the sheriff as a member of the state's executive department relevant, Pet. App. 13a, the court was wrong. As Justice O'Connor observed in *Praprotnik*, "if . . . a city's lawful policymakers could insulate the government from liability simply by delegating their policymaking to others, § 1983 could not serve its useful purposes." *Praprotnik*, 485 U.S. at 126. The Court has thus recognized that "[a]ny assessment of the applicability of a state law to federal civil rights litigation, therefore, must be made in light of the purpose and nature of the federal right." *Felder v.*

¹⁰ Similarly, any suggestion that the Eleventh Amendment bars county liability in this case would be misguided. Sheriff Tate has been sued in his official capacity as an officer of Monroe County, and the lower courts have treated his claims as such. Pet. App. 2a n.2; *see also id.* at 35a. Cities and counties do not enjoy Eleventh Amendment immunity even though they are created and controlled to some degree by the state. *Hess v. Port Authority Trans Hudson Corp.*, 115 S. Ct. 394, 404 (1994). Most significantly the record indicates that any judgment against the sheriff is likely to be paid by the county through its insurance policy, not by the State of Alabama. The aim of the Eleventh Amendment is to protect the state and its treasury from liability. *See Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979).

Casey, 487 U.S. 131, 139 (1988). If states could insulate their counties from liability simply by designating sheriffs and others who operate on the local level as "state officials," § 1983 would certainly and easily be thwarted.¹¹ As the Fifth Circuit has recognized, even where state law identifies an elected official operating on the local level as a state official, county liability still exists because "county responsibility for violation of the Constitution cannot be evaded by such ingenious arrangements." *Crane v. Texas*, 766 F.2d 193, 195 (5th Cir.), *cert. denied*, 474 U.S. 1020 (1985).¹²

IV. RELEASING MONROE COUNTY AS A DEFENDANT ON A MOTION TO DISMISS WAS IMPROPER.

Alabama law demonstrates that the sheriff is a final policymaker for the county in the matters of law enforcement at issue in this case. However, even if state law were otherwise, Mr. McMillian would still be entitled to develop "custom and usage" facts to substantiate the

¹¹ In Texas, Maryland, and Louisiana, elected county sheriffs are part of the state judicial branch. *See* Tex Const. art. V, § 23; Md. Const. art. IV, § 44; La. Const. art. V, § 27 (for "parish" sheriffs). Yet these law enforcement officials would not be able to claim judicial immunity for unconstitutional conduct during law enforcement investigations under § 1983.

¹² Alabama courts have granted "state official" status to a wide variety of public employees for whom municipal liability could not be avoided under § 1983. *See, e.g., Alexander v. State ex rel. Carver*, 150 So.2d 204, 208 (Ala. 1963) (city police chief is "state official" because state legislature created his office and directed him to enforce state laws as well as municipal laws).

allegation that the sheriff subjected him to county policies which violated his constitutional rights. This Court has held that "custom and usage" is relevant even where statutory law does not, by itself, demonstrate final policymaker status. *Jett*, 491 U.S. at 737. The court below failed to address this point despite the existence of circuit case law that recognizes that the "identification of the [final] policymaker may often involve *fact-sensitive inquiries*. . . ." *Mandel v. Doe*, 888 F.2d 783, 793 (11th Cir. 1989). Under these circumstances, the district court improperly granted Monroe County's motion to dismiss. *See Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984) (dismissal proper only where "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations").¹³

¹³ For example, questions regarding the county's payment of any judgment against the sheriff could be relevant. *See Hess v. Port Authority*, 115 S. Ct. 394 (1994) (fact that judgment will not be paid from state treasury suggests that entity or person being sued is not alter ego of state for Eleventh Amendment immunity purposes).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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